

NO. 38739-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

REBA REED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard A. Jones, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it refused appellant's proposed "no duty to retreat" instruction. A copy of the proposed instruction is attached as an appendix to this brief. CP 10.

Issue Pertaining to Assignment of Error

Appellant was at her granddaughter's father's apartment when she was involved in an altercation with another woman. Appellant was charged with second-degree assault. At trial, she claimed self defense and requested a "no duty to retreat" instruction. A defendant is entitled to such an instruction whenever the evidence supports a finding that the defendant was assaulted in a place where the defendant was lawfully entitled to remain. The trial court refused to give the instruction, ruling that, as a matter of law, a "no duty to retreat" instruction is proper only where the defendant is in his or her own home at the time of the altercation. During closing argument, the prosecutor specifically asked the jury to consider appellant's alternatives to her use of force. Appellant was convicted. Did the trial court err in refusing to give the requested instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King Count Prosecutor's Office charged appellant Reba Reed and her daughter Sabrina Reed¹ with one count of second-degree assault, in violation of RCW 9A.36.021(1)(a). CP 4. A jury found Reba guilty, and the court sentenced her to a standard-range sentence of five months' imprisonment. CP 41. Reba timely filed a notice of appeal. CP 38.

2. Substantive Facts

a. The altercation

Reba is a 42-year-old mother of five, including 13-year-old twin brothers Kip and Kevin, and an older daughter, Sabrina. 5RP² 171, 209, 211.

Sabrina previously dated an individual named Eric Lee. She and Lee are the parents of a baby girl named Jarron. At the time of the incident in

¹ To avoid any confusion, all members of the Reed family are referred to by their first names throughout this brief.

² This brief refers to the report of proceedings as follows: 1RP - March 12, 1996; 2RP - March 13, 1996; 3RP - March 14, 1996; 4RP - March 19, 1996; 5RP - March 20, 1996; 6RP - March 21, 1996; 7RP - March 22, 1996.

question, August 13, 1995, Sabrina and Lee were no longer dating or living together. 5RP 17-18. Sabrina had moved in with her mother. 5RP 173.

Despite their break-up, the two still had contact. Sabrina had custody of Jarron, but Lee would visit with the baby. 5RP 37. Also, because Lee had no car, he would sometimes ask Sabrina to give him a ride to work. 5RP 37, 175. Lee did not have a telephone and frequently had his ten-year-old niece, Chrissy, call Reba's home in an attempt to get a message to Sabrina that he needed a ride. 5RP 38, 175-76.

On August 13, 1995, Lee asked Chrissy to get such a message to Sabrina. 3RP 65. Twice, Chrissy called Reba's home and both times Kip and Kevin hung up on her. 3RP 65-66. Lisa Gregerson, who is Chrissy's mother and Lee's sister, saw Kip and Kevin later that day and spoke to them about hanging up on her daughter. According to Gregerson, she used a normal tone of voice with the boys and they did not appear upset. 3RP 57-58, 66.

But Kevin was upset. He went to his mother and told her that Gregerson had threatened to physically harm him. 5RP 177-78, 209.

After learning what had happened, Reba and Kip drove to Lee's apartment to speak to him about Gregerson. Kevin did not want to leave the house so he stayed behind. When they arrived, Sabrina was already there. 5RP 182-83. Sabrina called Gregerson on a cellular phone and spoke with her. Reba then took the phone and yelled at Gregerson, telling her to stay away from the boys. Gregerson responded by calling Reba a bitch. 5RP 185-87. After the call, Reba realized that the situation was ridiculous. She apologized to Sabrina and Lee and returned to her car, where Kip was waiting. 5RP 188.

Shortly thereafter, Reba was contacted by Enumclaw Police Officer John Buss. 5RP 189. Buss arrived in response to a complaint that people were arguing at the apartment building. He asked Sabrina and Reba whether they had seen or heard anything, and they said "no." 3RP 19-23. Reba did, however, inform him that a woman had "gotten into her son's face and that she had exchanged words with her." 3RP 23. Reba told Buss that if it happened again, she was going to have more words with the woman. 3RP 23. According to Buss, Reba

did not appear angry at that point and explained to him that she planned to go home. 3RP 24-25; 5RP 190.

After Buss left, Reba remained in her car for awhile. She was speaking with Kip, who had witnessed her telephone conversation. She was not proud of her display, and they were engaged in deep conversation about the incident. 5RP 190. What happened next was the subject of debate at trial.

i. Eric Lee

According to Lee's testimony, Gregerson arrived at his apartment. She was angry and started yelling at him. 5RP 20, 30. She had been drinking; she smelled of alcohol, slurred her words, and was belligerent. Lee told her to leave, but she refused. 5RP 20-22. At the time, Lee's right hand was broken and in a sling and he was holding Jarron in his left arm. He sat the baby down so that he could escort his sister out of the apartment. As he walked Gregerson out, she slapped him on the face. Lee took Gregerson outside and closed the apartment door. 5RP 21-23.

He then picked up Jarron again. Gregerson reentered the apartment and Lee once again escorted

her outside to the front porch. 5RP 22. Gregerson was still yelling and attempted to hit Lee a second time. But she missed, hitting Jarron in the face and causing the baby to scream. 5RP 23.

According to Lee, Sabrina became hysterical. Gregerson then grabbed Sabrina by the hair and started to pull her over the porch railing. The last thing that Lee saw before taking Jarron back into his apartment was Reba trying to break up the fight. Lee did not see the struggle that ensued. 5RP 24-25.

ii. Reba Reed

Reba also testified at trial. She explained that while still speaking to Kip in the car, she heard Sabrina scream "Oh, my God, Lisa, you've hit the baby" and heard Jarron cry. 5RP 191-92. Reba was scared. She got out of the car and ran to Sabrina. 5RP 191-92. She saw Sabrina doubled over and Lisa hitting her. She thought Jarron was in Sabrina's arms and that Sabrina had taken this defensive posture to protect the baby. 5RP 192, 205. Reba pulled Gregerson off of Sabrina and then was relieved to see that Lee was standing in the doorway holding Jarron. 5RP 195.

At that point, Gregerson was holding on to Reba's shirt and Reba was jerked down the stairs. Gregerson and Sabrina fell with her, with Reba landing on top of Gregerson. Gregerson began to hit Reba and Reba responded by hitting her back and telling her to stop. 5RP 196-98. Reba let go of Gregerson and went to get up, but Gregerson kicked her in the pelvis. In response, Reba "went on her again" and hit her. Kip then grabbed his mother's shoulder and indicated that he wanted to leave. Reba got off of Gregerson a second time and headed back to her car. 5RP 199-200. Reba had visible marks on her arms, scrapes, and bruises. 5RP 201-204.

iii. Michael Krebsbach

A number of individuals who witnessed the fight also testified at trial. Nineteen-year-old Michael Krebsbach, who had known the Reeds for a number of years, was rollerblading in a parking lot across the street from Lee's apartment. 5RP 96-97.

Krebsbach saw and heard Reba yelling on the telephone while she stood on the front porch of Lee's apartment. 5RP 99-100.

Later, he saw the police arrive and talk to

Reba. 5RP 100-02. According to him, the moment the officers left the area, Gregerson emerged from between two buildings. 5RP 102. He saw Gregerson charge the deck where Lee and Sabrina were standing. He witnessed Gregerson take a swing at Lee while Lee held Jarron in his arms. Krebsbach could not remember if he heard Jarron cry, but he heard Sabrina say something like "you hit the baby." 5RP 103-06, 133-34. He believed that Gregerson then attacked Sabrina and he saw the two struggling, each holding on to the other's hair. Eventually, they fell off the porch and onto the ground. 5RP 105-06.

According to Krebsbach, while Gregerson and Sabrina were struggling, Reba got out of her car. He saw Reba separate the two and, at that point, saw Gregerson take a swing at Reba. He saw Reba respond by jumping on top of her. 5RP 106-08. Krebsbach did not see Reba hit Gregerson, but he could hear the two yelling at each other. Krebsbach saw Reba let Gregerson up and saw Gregerson leave the way she had come. 5RP 109.

iv. Matthew Conneway

Matthew Conneway witnessed the events as he was standing across the street from the apartment talking to friends. 5RP 155. Conneway also knows the Reeds. 5RP 154. He saw Lee standing on the porch with Jarron in his arms. Gregerson came up to him "forcefully" and took a swing at him. Conneway saw Lee push Gregerson away, causing her to fall. At that point, Conneway saw Sabrina run to the porch and heard her say "Oh, my God, the baby." 5RP 156. As Sabrina ran up the porch stairs, he saw Gregerson and Sabrina confront each other and then start rolling around on the ground.

He could not see how they ended up on the ground because his view was partially obstructed. 5RP 157.

According to Conneway, Reba then separated Gregerson and Sabrina, and Gregerson took a swing at Reba. Conneway saw the two fall to the ground and then saw Reba hold Gregerson down. According to Conneway, the encounter ended when Kip pulled his mother off of Gregerson. 5RP 157-58. Gregerson then got up and ran off. 5RP 166. Conneway remembered the police arriving, but he

recalled that they had done so after the fight.³
5RP 163-66.

v. Mare Mace

Two residents of Lee's apartment building, who saw or heard portions of the fight, also testified at trial. Mare Mace lives upstairs from Lee. 4RP 22. Mace testified that on the evening in question, she was lying in bed when she heard yelling. She looked out her window and saw a woman walking back and forth from her car to what she believed was Lee's apartment. 4RP 23. To Mace, it appeared that the woman was in her early 40's. 4RP 25. Mace returned to her bed. 4RP 26.

The next thing that she heard was the sound of loud knocking on Lee's door. She returned to her window and saw a light go on in a hall located in the apartment building. 4RP 27-28. In an anxious voice, she heard Lee say "get her inside." 4RP 28.

Mace heard the sounds of a fight coming from the

³ On two different occasions, close to the time of the altercation, the police responded to complaints of a disturbance at Lee's apartment. 3RP 21-27. Whether these contacts occurred before or after the altercation is not entirely clear and was debated at trial. 6RP 46-48, 73-74.

hallway. She heard a baby cry and a female say "you made my baby cry, or something like that." 4RP 28-29.

At that point, the hall light went out and two people were scuffling as they came down the stairs.

4RP 29. Mace did not know Gregerson or Sabrina, but had seen Sabrina several times in the past. 4RP 29-30. To Mace, it appeared that Sabrina had Gregerson by the hair. 4RP 31. Mace testified that she saw the woman in her 40's "dragged into" the fight. 4RP 32. She saw that woman straddling Gregerson, hitting her in the face and cursing at her. 4RP 33. She also saw Sabrina kick Gregerson a couple of times. 4RP 34. Mare left the window and called 9-1-1. By the time she returned, the fight was over. 4RP 35.

vi. Orville Roberts

A second tenant of the building also heard the commotion. Orville Roberts, who lives above Lee, testified that he was getting ready for bed when he heard a woman downstairs yelling. 6RP 14-15. He heard the woman repeatedly ask that someone be called, and Roberts discerned that somebody had threatened the woman's son. 6RP 16.

Fifteen to twenty minutes later, Roberts heard a female yelling about a baby and not wanting it to get hurt. 6RP 17-18. Upon hearing this, Roberts called 9-1-1 because he was concerned for the safety of the child. 6RP 17, 26. Roberts saw the police arrive shortly thereafter. 6RP 18.

vii. Lisa Gregerson

Gregerson also provided her version of the events. 3RP 84. She admitted consuming alcohol on the day of the incident, but claimed to have had only two beers. 3RP 110. She testified that after receiving the telephone call, she drove to Lee's apartment, figuring that he would know what all of the screaming on the telephone had been about. 3RP 66-67.

According to Gregerson, the front door to Lee's apartment was open and she called to him. She testified that Jarron was in a crib in a back bedroom and Jacob, Lee's other child, was on a bed in that same room. 3RP 71. She attempted to ask Lee what was going on and he responded by telling her to get out of his life. According to Gregerson, as she backed away from Lee, Sabrina grabbed her by the hair and called her a bitch.

3RP 72. Gregerson responded by grabbing Sabrina.
3RP 103-04.

According to Gregerson, she fell down the stairs and the next thing she remembers is that Reba was sitting on top of her, pulling her hair, slapping her, punching her, and saying "this will teach you to pick on my sons." 3RP 72-73. At the same time, Sabrina was yelling at her and kicking her. 3RP 73. According to Gregerson, Sabrina said "that's enough." Reba then hit Gregerson a few more times and let her up. 3RP 75. Gregerson ran to her car, drove home, and her mother called 9-1-1. 3RP 75.

Gregerson went to the hospital, where she was treated for her injuries. 3RP 76. Her nose was broken, she had a one-inch laceration inside her mouth that required stitches, some of her hair had been pulled out, and she was scratched, bruised, and sore. 5RP 76-81. At trial, she also claimed that her jaw had been broken. 3RP 76. But the testimony of her treating physician, Dr. Leonard Savage, did not support this claim. Savage testified that Gregerson had mild swelling in that area and that he did not even order an x-ray of her

jaw. 5RP 87.

Despite the testimony of each of the other witnesses at trial, Gregerson steadfastly denied that Lee ever held Jarron in his arms during the incident. She testified that Jarron had been in her crib in the bedroom the entire time. 3RP 100-01, 114-15. According to Reba, however, Jarron's crib was at her house, not Lee's apartment, at the time of the altercation. 5RP 174.

b. The no duty to retreat instruction

Reba requested that the trial court give WPIC 17.05, otherwise known as the "no duty to retreat" instruction, which reads:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that she is attacked to stand her ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

4RP 128; CP 10.

The prosecutor responded by arguing that such an instruction is appropriate only where the altercation occurs in a person's home or business.

He indicated that he would like to review State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984), but didn't believe that the instruction was

appropriate. 4RP 129.

Initially, the court reserved ruling. 4RP 129-30. Later, the court declined to give the proposed instruction, reasoning as follows:

The Court reread the Allery decision, and I believe that that decision is limited to the facts of that particular case. That particular opinion regarded the circumstance where the victim in that case was a woman who was at her home. And it was a situation where her husband had placed her in a situation where she pulled a firearm or a rifle out and shot him when she believed he was coming after her with a knife.

Under those circumstances, since she was at her home, the Court believes that those circumstances limit it to the particular facts of that case. And the Court's not aware of any other case that would support the giving of that type of instruction under the circumstances before this court. For those reasons, the Court will not be giving that particular instruction.

5RP 144.

During closing argument, the prosecutor specifically asked the jurors to consider what alternatives to the use of force existed for Reba at the time of the altercation. 6RP 81-82. The jury found Sabrina not guilty of second-degree assault, but convicted Reba. 7RP 4. She now appeals.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE
THE "NO DUTY TO RETREAT" INSTRUCTION.

It has long been the law in Washington that a person bears no duty to retreat when he or she is assaulted in any place where he or she has a right to be. See Allery, 101 Wn.2d at 598; State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936). It is also the law that a defendant is entitled to a "no duty to retreat" instruction whenever there is sufficient evidence in the record to support it. Allery, 101 Wn.2d at 598 (citing State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979)).

Recently, in State v. Williams, 81 Wn. App. 738, ___ P.2d ___ (1996), this Court reaffirmed both of these principles and clarified under what circumstances such an instruction is required. Williams involved an appeal by codefendants Charles and Nalen Williams of their convictions for felony murder. Williams, 81 Wn. App. at 739.

At trial, Charles testified that while he was standing in the street, the decedent, Joseph Wade, threatened him with a knife. Charles responded by grabbing a shovel, advancing on Wade, and then backing away. Charles' brother Nalen then arrived on the scene and took the shovel. Now disarmed, Charles left and grabbed a pitchfork. When he returned, Nalen was trying to disarm Wade by knocking the knife from his hands. Charles testified that Nalen killed Wade when he hit him in the back of the head with the shovel. Nalen claimed that Charles had inflicted the lethal blow with the pitchfork. Williams, 81 Wn. App. 740.

The trial court instructed the jury that self defense is justified only when the force used "is not more than necessary." Williams, 81 Wn. App. at 741. The court also instructed the jury that force was "necessary" only where "no reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended" Williams, 81 Wn. App. at 741. Both defendants requested a "no duty to retreat" instruction, but the court denied the requests because both defendants had, at various times, testified that they had retreated during the fight. Williams, 81 Wn. App. at 741.

This Court reversed. In doing so, it repeated the long-standing rule that "[f]light, however reasonable an alternative to violence, is not required" in Washington. Williams, 81 Wn. App. at 743-44. Citing to Allery, this Court emphasized that a defendant is entitled to a "no duty to retreat" instruction whenever the "evidence supports a finding that the defendant was assaulted in a place where the defendant was lawfully entitled to be." Williams, 81 Wn. App. at 742. This Court acknowledged that such an instruction need not be given when a defendant actively retreated, but found that neither Charles nor Nalen had done so. Williams, 81 Wn. App. at 742-43 (citing State v. Thompson, 47 Wn. App. 1, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987)).

This Court recognized that the failure to instruct the jury regarding the absence of a duty to retreat raised the possibility that the jury rejected the Williams' self-defense claims on improper grounds.

In the absence of the "no duty to retreat" instruction, a reasonable juror could have believed Charles, or Nalen, or both, but could have erroneously concluded that the brothers used more force than was necessary because they did not use the obvious and reasonably effective alternative of retreat. Thus, we clarify the rule, and hold that where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.

Williams, 81 Wn. App. at 744 (emphasis added).

Because there was a possibility that the jury had erroneously concluded that the Williams' failure to retreat resulted in the use of excessive force, this Court refused to find the error harmless.

Williams, 81 Wn. App. at 744.

Williams is soundly reasoned and controls in Reba's case. As in Williams, the jury here was instructed that self defense is justified only when the force used "is not more than necessary." CP 32. As in Williams, the jury here was instructed that force was "necessary" only where "no reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended" CP 33. And, as in Williams, the absence here of a "no duty to retreat" instruction raises the possibility that a reasonable juror may have found the defense evidence credible, but erroneously concluded that Reba used excessive force because she never used the obvious and reasonably effective alternative of retreat.

It is impossible to know whether one or more of the jurors fell prey to this inviting error. There is certainly as strong a possibility here as there was in Williams. On at least three different occasions during the course of the altercation, Reba arguably had an opportunity to flee rather than exercise her right to stand firm.

The first opportunity occurred immediately after Reba pulled Gregerson off of Sabrina. Krebsbach testified that after Reba separated the two, Gregerson took a swing at Reba. 5RP 108. The jury may have believed that, at that moment, particularly since Jarron and Sabrina were no longer in imminent danger, Reba should have retreated. Instead, Reba chose to defend herself. 5RP 108.

The second opportunity arguably occurred after Reba, Sabrina, and Gregerson fell off of the porch.

According to Reba's testimony, Gregerson hit the pavement first and Reba fell on top of her, at which time Gregerson began to hit her. 5RP 197. Again, the jury may have believed that at that moment, Reba should have gotten off of Gregerson and retreated. Instead, Reba chose to defend herself. 5RP 198.

The third opportunity arguably occurred after Reba had gained control over Gregerson. Reba testified that once she had control, she let go of Gregerson and went to get up. Gregerson responded by kicking her in the pelvis. 5RP 199. Again, a reasonable juror may have erroneously believed that

Reba was required to retreat at that moment. Instead, Reba chose to defend herself. 5RP 199.

The possibility of juror error in this regard is heightened by the prosecutor's remarks during closing argument. In attacking Reba's self-defense claim, the prosecutor focused on the meaning of "necessary." She told the jury to assume that Reba was telling the truth and that she reasonably believed that she was acting in defense of Jarron and herself. 6RP 80-81. She then directed the jury's attention to instruction 17, which defines "necessary," and emphasized that even if this were true, there had to be no reasonably effective alternative to the force employed. The prosecutor then specifically asked the jurors to consider what alternatives existed for Reba at the time of the altercation. 6RP 81-82.

Although the prosecutor never specifically mentioned retreat as an alternative, this line of argument, combined with the absence of a "no duty to retreat" instruction, effectively invited the jurors to consider retreat as an alternative to the force used. This could have been prevented had the trial court given the requested instruction. The

court's refusal to do so was error.

Anticipating the State's response to this error, the State will likely argue that reversal is not required because the error was harmless. The State cannot meet its burden in this regard. "An instructional error was harmless only if it was trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986)(citing State v. Stewart, 35 Wn. App. 552, 555, 667 P.2d 1139 (1983)). The erroneous refusal of a "no duty to retreat" instruction will be considered harmless only "if the court is convinced beyond a reasonable doubt that any reasonable juror would have reached the same result despite the error." Williams, 81 Wn. App. at 744 (citing State v. Aumick, 126 Wn.2d 422, 430-31, 894 P.2d 1325 (1995)).

Here, as in Williams, a reasonable juror may well have believed the defense witnesses, but concluded that Reba used more force than necessary because at no time did she retreat from Gregerson's attacks. It is simply not possible on this record

to say that the error was harmless beyond a reasonable doubt.

D. CONCLUSION

The evidence below supports a finding that Reba was assaulted in a place where she was lawfully entitled to remain. Therefore, the jury should have been instructed that she had no duty to retreat. The trial court's failure to do so created the possibility that a juror might erroneously conclude that Reba used more force than necessary in defending herself because she failed to retreat. The prosecutor's closing argument increased the likelihood of this error.

Reba's conviction should be reversed and she should be given a new trial, one in which the jury is properly instructed on the law.

DATED this ____ day of October, 1996.

Respectfully submitted,

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